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## THE PANAMA CANAL ACT AND THE BRITISH PROTEST

The Panama Canal project has its roots deep in the past. The diplomatic complications presented by the enterprise have been as difficult to overcome as the engineering obstacles. Now that the dream of ages is about to become a reality, certain of our newspapers, impressed with the magnitude of the task which the United States has undertaken and carried well-nigh to completion, are asking impatiently, what rights has Great Britain in the canal, why should she venture to dictate what use we shall make of our own property? Merely to say that England has rights under the Hay-Pauncefote treaty does not appear to satisfy these critics. They ask again, why did the United States ever give England any voice at all in the matter? In order to answer this question we have to go back to the middle of the last century when the Clayton-Bulwer treaty was negotiated and see what the relative positions of the United States and England with respect to the isthmus were at that time.

The acquisition of California in 1848 and the rush to the gold fields the following year first made the isthmian canal project a live issue. The great transcontinental railroads which fifteen or twenty years later established direct overland communication with the Pacific coast were then scarcely thought of. American engineers at that time and for years afterwards considered the Nicaragua route the most feasible one for an interoceanic canal, but England held Greytown, the Atlantic terminus of that route, as well as a protectorate over the Mosquito Coast. In view of this fact and of Great Britain's naval supremacy in the West Indies, it was evident that the United States could take no step in the construction of a canal without arriving at an understanding with the British Government. Under these circumstances the Clayton-Bulwer treaty was negotiated and in due course ratified by the Senate. Besides pledging each to the other never to obtain or maintain exclusive control over the canal, never to erect or maintain fortifications commanding the same or in the vicinity thereof, never to colonize or exercise

dominion over any part of Central America, the two contracting parties agreed that the canal should be neutralized in the event of war between them, that other nations should be invited to accede to the treaty, and that the general principle established in this treaty should apply not only to the Nicaragua route but also to the Panama or any other route that might be adopted. Thus it will be seen that Great Britain gave up Greytown, her protectorate over the Mosquito Coast, and the right to acquire territory in Central America, and received in return an equal voice with the United States in the control of any canal that might be built through the isthmus at any point. The treaty was criticised at the time as a violation of the Monroe Doctrine, but when we consider the relative positions of the two Powers and the check which the treaty placed on the extension of British influence in Central America, such criticism does not appear to be well founded.

Thirty years later, stirred by the French operations at Panama, President Hayes declared in a special message of March 8, 1880, that it was "the right and the duty of the United States to assert and maintain such supervision and authority over any interoceanic canal across the isthmus" as would protect the national interests and that the canal would be "virtually a part of the coast-line of the United States." This was intended to apply to a canal constructed by French capital. The following year Mr. Blaine, as Secretary of State, undertook to get England to acquiesce in the new policy, and argued at length that the Clayton-Bulwer treaty had been practically superseded by the changed relations of the two Powers, meaning the increased prestige of the United States on this continent, and was no longer binding. His successor, Mr. Frelinghuysen, went a step further and declared the treaty "voidable at the pleasure of the United States." He did not, however, venture to declare it "void." The British Government met these arguments by stating quietly that it would adhere to its rights under the treaty, intimating that if the treaty were abrogated England would put herself in the same position which she occupied prior to its negotiation.

Later, Mr. Olney, in a review of the situation, declared: "Upon every principle which governs the relations to each other, either of nations or of individuals, the United States is completely estopped from denying that the treaty is in full force and vigor. If changed conditions now

make stipulations, which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in ingenious attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter." It was precisely in this spirit that Mr. Hay negotiated with Lord Pauncefote in 1900 a new treaty.

The first draft of the Hay-Pauncefote treaty was considered objectionable by the Senate because it still recognized England's joint responsibility with the United States for the neutralization of the canal, including the regulation of traffic, and provided for the adherence of other Powers. The Senate, therefore, amended the treaty, but in such a way that the British Government refused to accept the amendments. After the lapse of a year a second draft, meeting in the main the views of the Senate, was formulated by Mr. Hay and Lord Pauncefote and finally ratified by the Senate, December 16, 1901. This treaty is still in force. Article I expressly abrogated the Clayton-Bulwer treaty. Article II provided that the canal might be constructed by the United States directly or under its auspices and that it should be under its exclusive management. In Article III the United States agreed to adopt as "the basis of neutralization" substantially the rules of the Constantinople Convention of 1888 for the free navigation of the Suez canal. These rules as modified are stated in the treaty under six heads, the first declaring that "The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable." The remaining rules forbid the blockade of the canal, regulate the passage of war vessels, prizes, troops and munitions of war, and forbid any acts calculated to injure the canal or impair in any way its operation.

"These rules," said Secretary Hay in a memorandum prepared for the Senate Committee on Foreign Relations, "are adopted in the treaty with Great Britain as a consideration for getting rid of the Clayton-Bulwer treaty, and the only way in which other nations are bound by them is that they must comply with them if they would use the canal."

President Roosevelt, in a message to Congress of January 4, 1904, said of this treaty: "In order that no obstacle might stand in our way, Great Britain renounced important rights under the Clayton-Bulwer treaty and agreed to its abrogation, receiving in return nothing but our honorable pledge to build the canal and protect it as an open highway."

In the message just quoted President Roosevelt was undertaking to defend his course in acquiring the Canal Zone, and his main ground of justification was that Colombia was not entitled "to bar the transit of the world's traffic across the isthmus," and that he was acting for the world at large. To quote his exact words: "I confidently maintain that the recognition of the Republic of Panama was an act justified by the interests of collective civilization. If ever a government could be said to have received a mandate from civilization to effect an object the accomplishment of which was demanded in the interest of mankind, the United States holds that position with regard to the interoceanic canal." Waiving all discussion of the question as to whether President Roosevelt in the rôle of agent of collective civilization was justified in his hasty recognition of the Panama Republic, it cannot be denied that the American people entered upon the construction of the canal with the idea that they were undertaking a great work for the benefit of the world at large. With the successful prosecution of the work, however, public opinion has to a large extent outgrown this idea of "a mandate from civilization," and now the canal is regarded primarily as a military asset to be used as a naval base, and secondarily as a commercial asset to be used in overcoming foreign competition in the upbuilding of our merchant marine.

Great Britain has fully conceded our right to adopt measures for the defense of the canal. This interpretation of the treaty was acquiesced in by Lord Landsdowne during the negotiation of the treaty in a memorandum dated August 3, 1901, and in the recent British protest we find the following statement on this point: "Now that the United States has become the practical sovereign of the canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection." Great Britain has, therefore, released us from all the restraints on our action imposed by the Clayton-Bulwer treaty and fully recognizes the canal as our property, subject, however, to the pledge

that, — “The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.”

The Panama Canal Act of August 24, 1912, exempts from the payment of tolls American ships engaged in the coastwise trade. Against this exemption the British Government formally protests in a note presented to Secretary Knox by Ambassador Bryce on December 9, 1912. Sir Edward Grey, the author of this note, claims that the Panama Canal Act violates the Hay-Pauncefote treaty in two particulars: (1) in assuming that the words “all nations” in the rule quoted above mean “all *other* nations,” and (2) in ignoring the pledge that the “conditions and charges of traffic shall be just and equitable.” It is expressly stated in the preamble of the Hay-Pauncefote treaty that the general principle of neutralization established in Article VIII of the Clayton-Bulwer treaty is retained unimpaired. The article referred to reads as follows:

The governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America; and especially to the inter-oceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid governments shall approve of, as just and equitable; and that the same canals or railways, *being open to the citizens or subjects of the United States and Great Britain on equal terms*, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

Sir Edward Grey says: “A study of the language of Article VIII shows that the word ‘neutralization’ in the preamble of the later treaty is not

there confined to belligerent operations, but refers to the system of equal rights for which Article VIII provides."

The claim that the Panama Canal Act violates the provision that the charges shall be "just and equitable" is set forth thus: "Unless the whole volume of shipping which passes through the canal, and which all benefits equally by the services, is taken into account, there are no means of determining whether the tolls chargeable upon a vessel represent that vessel's fair proportion of the current expenditure properly chargeable against the canal, that is to say, interest on the capital expended in the construction and the cost of operation and maintenance."

In the foregoing pages the attempt has been merely to give the historic setting of the controversy and to make clear the points at issue. Here is a treaty, — a formal contract between two friendly nations who have many interests in common, — and no one can deny its binding force, that is to say, our legal and moral obligation faithfully to observe its stipulations. The United States has given official interpretation to one of its provisions, as we had a perfect right to do, in the Panama Canal Act. We had no intention of violating the treaty or of abrogating it. Great Britain puts a very different interpretation on the same provision, and she has the perfect right to say what she believes the treaty to mean. What are we to do? Are we to assert dogmatically that we are right and that Great Britain is wrong? Are we willing to go a step further and declare that we will fight for our contention against the nation who submitted the Alabama claims to arbitration and honorably paid the award? Ethical considerations aside, we are legally bound by the terms of our arbitration convention with England, signed in 1908, to arbitrate this dispute, if England demands it. Article I of that treaty reads:

Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

The question of tolls cannot be said to affect the "vital interests, the independence, or the honor" of the country. Senator Root, who, as

Secretary of State, negotiated the arbitration treaty, declares with great emphasis that if we refuse to arbitrate the canal question "we will be in the position of the merchant who is known to all the world to be false to his promises."

The main objection raised against arbitration is that we could not get an impartial tribunal. Senator O'Gorman is quoted in the *Washington Post* of December 11 as saying: "A point that has not been sufficiently stressed is that, even if we were willing to submit to arbitration, it would be impossible to find for this case an impartial tribunal. \* \* \* The case is nominally between the United States and Great Britain, but it would in reality be between American shipping interests and the shipping of the world." There is great misapprehension as to the organization and character of the Hague Court. Nations do not sit on that tribunal as judges, but it is composed of over a hundred jurists of international repute. When a particular case is submitted each of the parties to the suit selects one or two arbitrators from the general list or panel of the court and the two or four thus selected, as the case may be, choose another member of the general court as president. The tribunal thus created hears and decides the case. With the example of Charles Francis Adams in the Geneva Arbitration and of Lord Alverstone in the Alaskan Boundary Dispute before us, not to mention the highly honorable record of the British Admiralty Courts and of the Supreme Court of the United States in prize cases, can it be fairly maintained that we could not get an impartial hearing before the Hague Court because of the interests of other nations in the issue at stake? Is it to be supposed that international jurists of the stamp of the late Professor de Martens, of Asser, Savornin Lohman, Gram, Lammasch, and Renault, some of whom have sat on as many as four Hague tribunals, would place the shipping interests of their countries above their sense of justice and their good repute as jurists?

The United States and England are the only two parties to the Hay-Pauncefote treaty. When the agreement was being drafted the British Government proposed that Rule 1 of Article III should read as follows: "The canal shall be free and open to the vessels of commerce and of war of *all nations which shall agree to observe these rules*," but that implied the necessity of making them parties to the contract. The United

States, therefore, insisted that this clause should be changed to read thus: "The canal shall be free and open to the vessels of commerce and of war of *all nations observing these rules*." "Thus," says Mr. Hay in his memorandum, "the whole idea of contract right in the other Powers is eliminated, and the vessels of any nation which shall refuse or fail to observe the rules adopted and prescribed may be deprived of the use of the canal."

On the face of it, the Hay-Pauncefote treaty looks like a contract for the benefit of third parties, but it is evident when one looks more closely into the circumstances of its negotiation that England was not acting in behalf of the other nations, but was merely taking extra precaution to safeguard her own interests against any possible discrimination by placing the commerce of the world on the same footing. The interest of third parties, therefore, is not a direct interest, but merely a resultant interest. They cannot be made parties to the suit.

Two methods of avoiding arbitration have been suggested in the daily press. The *Washington Post* boldly urges the abrogation of the Hay-Pauncefote treaty, on the ground that it is "a stumbling block to the United States, and a menace to the Monroe Doctrine." The excuse for such a drastic recommendation is that, "The treaty is voidable because the canal is American territory — a condition that did not subsist when the treaty was made." This point is fully covered by Article IV of the treaty, which is as follows:

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

Another suggestion, attributed by the *Literary Digest*, of December 21, to Senator McCumber, is to let the controversy hang on until June, 1913, when the arbitration treaty of 1908 expires by limitation, unless renewed. Other Senators have indignantly rejected such a suggestion, Senator Lodge declaring that "the United States would not stoop to tricks."

The real argument against arbitration is not that we cannot get a fair hearing, but that in the opinion of many of our best informed publicists we have put a wrong interpretation on the treaty and, therefore, will probably lose our case. Under these circumstances would it not be

wiser to repeal the Canal Act, or so much of it as relates to the exemption of our coastwise shipping from tolls?

Professor Emory R. Johnson, the special commissioner on Panama Canal traffic and tolls, has recently submitted an elaborate report to the Secretary of War. After an exhaustive study of the whole traffic history of the Suez, Kiel, Manchester, and Amsterdam canals, and a careful analysis of the commerce that will be attracted to the Panama Canal and the rates it can stand, he states the following conclusions:

1. In managing the Panama Canal and in fixing tolls, the usefulness of the waterway to commerce and industry should be given first consideration. The policy as regards tolls and revenue should not be allowed to limit the traffic usefulness of the waterway.

2. The Panama Canal should be made commercially self-supporting. Tolls based upon the value of the service rendered by the canal are justifiable. Those who use the waterway may justly be required to make some compensation for the benefits received. Tolls, not unduly restricting the commercial usefulness of the waterway, may be levied that will yield revenue enough to meet operation, maintenance, sanitation, government, annuity, and interest charges.

3. The same rate of toll should be charged upon American as upon foreign vessels, because (a) the omission or repayment of tolls on American shipping would be of assistance mainly to our coastwise shipping which does not need aid and would be of but little help to American vessels engaged in the foreign trade; (b) Such subsidies as are given the American merchant marine should be paid to vessels employed in our foreign trade; but the remission or repayment to vessel owners of Panama tolls on American ships in the foreign trade would be an ineffective subsidy that might invite retaliatory measures by foreign governments; (c) The exemption of coastwise shipping from Panama tolls would inure mainly to the benefit of the coastwise carriers and only partially to the benefit of shippers and consumers. Neither the rates of the steamship lines nor the charges of the rail carriers will be appreciably higher if tolls are charged on coastwise shipping than they will be if such shipping is relieved from the payment of tolls.

4. The United States should adhere to business principles in the management of the Panama Canal. The Government needs to guard its revenues carefully. Present demands on the general budget are heavy and are certain to be larger. Taxes must necessarily increase. Those who directly benefit from using the canal, rather than the general tax-payers, ought to pay the expenses of operating and carrying the Panama Canal commercially.<sup>1</sup>

<sup>1</sup> E. R. Johnson, *Panama Canal Traffic and Tolls*, p. 201.

Mr. Stimson, in his annual report as Secretary of War, dated December 8, 1912, strongly endorses Professor Johnson's position. He says: "Since it is becoming constantly more apparent that the remission of tolls to our coastwise vessels will in effect amount to a payment of national funds to a special industry which does not need such assistance, I renew my suggestion \* \* \* that such remission of tolls be not granted, and that the act be amended to that effect." President Taft has adopted Professor Johnson's recommendations as to the rates to be charged, but has not taken his advice on the subject of the coastwise trade. The question, why should we make our ships pay tolls to pass through a canal which we have built with our money, sounds very plausible, but as Professor Johnson points out, the benefit will accrue not to the American people who have built the canal, but to a small group of shipowners engaged in the coastwise trade, while the American people will have to pay for the exemption through increased taxation.

The Panama Canal Act was passed without due understanding of the questions involved. Many of our most experienced public men regard it as a mistake. Why not repeal, or modify it? We would in this way avoid the risk of an adverse decision from the Hague Court and the heavy expense incident to the suit. It is of vast importance that the world should be convinced that we intend to act in good faith in this matter. If the canal is to fill the place that we expect it to fill as a great channel for the world's commerce, then we must administer it with due regard for the interests of the world at large.

JOHN HOLLADAY LATANÉ.